In the District Court of the United States for the Southern District of New York

CRESCENT EXPRESS LINES, INC.,
PLAINTIFF–APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS–APPELLEES

CIVIL NO. 19–339

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted district court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The decree, together with written opinion, findings of fact and conclusions of law, was entered [1] on March 6, 1943. An appeal was allowed on April 16, 1943, and service of the appeal papers was made upon appellees on April 22, 1943.

[1] The decree was actually dated February 27, 1943.

The order of the Commission (Division 5), dated September 2, 1941 (reconsideration of the matters decided therein being denied by the entire Commission on July 13, 1942), granted to appellant a certificate as a common carrier of passengers by motor vehicle under the "grandfather clause" of Section 206 of the Motor Carrier Act of 1935, as amended. However, the Commission imposed certain limitations which appellant contends were not warranted by the Act.

The facts and the issues of law are clearly set forth in the findings of fact, conclusions of law, and opinion of the District Court. On June 1, 1935, the crucial "grandfather" date, appellant[2] was operating a fleet of six sedan motor cars each capable of seating six passengers in addition to the driver. It operated between New York City (the Bronx) through New Jersey to points in Sullivan and Ulster counties, New York within twenty miles of Woodbourne, New York (the Catskill resort country). In some cases it picked passengers up at their houses in New York and dropped them at their hotels or boarding houses in the resort areas and vice versa. In other cases it picked passengers up at an "office" at 531 East 169th Street in the Bronx or at the passenger station in Woodbourne. That part of the route which was between New York City and Wurts-

[2] Actually appellant's predecessor.

boro, New York through New Jersey, was always over the same roads. Beyond that, however, the route was determined by the passengers' destination. Appellant's operations were not upon any schedule.

The Commission, after an informal hearing at which appellant's predecessor presented evidence, issued on June 20, 1938, a considerably broader certificate than the one now under attack. Protests, were, however at once filed against this order by a number of bus lines, and, as a result, further informal hearing was held on December 1, 1938. Appellant's predecessor[3] was given notice of this hearing but did not attend. No new evidence was offered at this hearing.

After reconsideration of the same record the Commission issued the present certificate to appellant. This certificate granted appellant the right to operate between New York and points in Sullivan and Ulster counties, New York. However, it restricted in certain respects the type of service to be performed.

Thus, the certificate limited appellant's service to "the transportation of not more than six passengers in any one vehicle, but not including the

[3] The lower court found (Finding of Fact No. 6) that such notice was given to appellant. Appellant in its jurisdictional statement (p. 13) denies that such notice was given to it. Actually the record shows that a notice of rehearing was sent by the Commission to Crescent Mountain Service, which was appellant's predecessor then operating the business.

driver thereof, and not including children under ten years of age who do not occupy a seat or seats." It also described the service to be rendered by appellant as "door-to-door service,"[4] as being "non-scheduled," and as constituting "special operations" over "irregular routes."

Appellant contended below, principally, that the limitation in these five respects was beyond the Commission's statutory authority. It also urged that the Commission failed to make basic findings of fact, that there was a lack of substantial evidence to support the order, and that the Commission could not modify its earlier certificate of June 20, 1938, without taking further evidence. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The operations of appellant and its predecessor during the "grandfather" period are exactly like those which this Court recently considered in *Royal Cadillac Service, Inc.* v. *United States*, No. 423, this term. The Court there affirmed *per curiam* an unreported decision of a three-judge federal court which had sustained an order of the Commission denying a "grandfather" certificate to Royal Cadillac Service, Inc. That

[4] It is to be noted that the District Court construed the "door-to-door" limitation as not preventing appellant from picking up passengers at its fixed stations in the Bronx or elsewhere (Conclusion of Law No. 3).

company, as the opinions of the District Court and the Commission[5] indicate, during the early part of the "grandfather" period had conducted operations in the Catskill area in seven passenger sedans. These operations, like appellant's, were largely from door-to-door, with no fixed schedule, and following a fixed route for only that part of the journey between New York and Wurtsboro. Because Royal Cadillac subseqeuntly during the "grandfather" period had changed its operations to bus operations on a fixed schedule, between fixed termini, the Commission and the court held that there had been such a substantial change in the nature of the service as to break the continuity[6] of the same type of service required for a "grandfather" certificate.

The only difference between these two cases is that here there has been no change by appellant in the type of service rendered. Consequently, appellant is entitled to a certificate of some type. Appellant's objection to the certificate granted is that this certificate contains restrictions contemplated to prevent it from making, in the future, just such changes in the nature of its service as were made by Royal Cadillac in the past. But,

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[5] The Commission's decision is reported in *Royal Cadillac Service, Inc., Common Carrier Application*, 30 M. C. C. 469

[6] The "grandfather" clause requires that a carrier, in order to secure a certificate, must not only have been in *bona fide* operation on June 1, 1935, but that it also shall have "so operated since that time."

certainly, if the Commission can deny a certificate because of these changes in the type of service during the "grandfather" period, it can also by appropriate restrictions in a certificate prevent the same changes in the future in the nature of the service continuously rendered during the "grandfather" period. The power to impose such restrictions is plainly granted by Section 208 (a)[1] of the Motor Carrier Act, which requires the Commission in granting certificates to "specify the service to be rendered" and the "territory within which the motor carrier is authorized to operate." Under this language the Commission

[1] That section provides as follows (49 U. S. C. sec. 308 (a):

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6); *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

can and must attach limitations, whether geographic or otherwise, to insure the "substantial parity between future operations and prior *bona fide* operations" which the "grandfather" clause contemplates. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 481, 483.

Particular objection is made to the restriction as to the number of passengers to be carried. But that restriction is obviously designed, as the District Court states (Finding of Fact No. 8), to restrict appellant to the use of cars capable of carrying not more than six passengers, not including the driver—in short, to seven passenger sedans. It can scarcely be doubted that such a restriction directly relates to the type of service to be performed. There plainly is a substantial difference in character between the type of operations which may be conducted by a line of light, small, limited capacity passenger cars and those which may be conducted by a fleet of heavy, commodious, large capacity motor busses. Nor does the proviso of Section 208 (a) which forbids limitations restricting the "right of the carrier to add to its equipment and facilities" inhibit the present limitation. That proviso clearly has reference to quantitative rather than qualitative limitations, like the present one, as the District Court and the Commission, elsewhere,* have held.

* See particularly *Irving Nudelman, Common Carrier Application*, 22 M. C. C. 275, 28 M. C. C. 91. In the first deci-

This is well expressed in the following excerpt from the District Court's opinion (p. 6):

"* * * if the holders of such ["grandfather"] certificates have the same unlimited power to change the quality of their service as they have to add to its quantity, Congress, in an effort to prevent the unduly harsh import of a new system, created a favored group of carriers substantially free from all regulations over those routes on which they may have chanced to operate in June 1, 1935. So far at least, it is safe to say that Congress did not mean to go."

So far as the limitation as to "special" operations is concerned, the Commission was required to impose that, under the circumstances here, if a certificate was to be granted at all. Thus, Section 207 contains a proviso "that no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carrier may be authorized to engage in special or charter operations." Appellant was found not to be a regular route carrier between fixed termini and therefore this further limitation was necessarily required.

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sion in this case the Commission took the contrary view. On reconsideration the Commission in its second report took the present position. The fact that the Commission was somewhat undecided as to the scope of its powers in this situation, coupled with the large number of "grandfather" cases, explains the delay between the rehearing and the second order in the present case. The District Court so indicates in its opinion, pp. 2, 7.

As to the Commission's findings, while it did not issue the customary formal report in this case, its order contains all the requisite findings. Thus, the second paragraph of the instant order reads as follows:

"*It further appearing,* That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification set forth as appended on the reverse side hereof or attached hereto and made a part of this order; and the Commission so finding; * * *"

The appendix referred to completely describes appellant's operations during the "grandfather" period. Thus, the Commission clearly states the basic, as apart from the evidentiary, facts. This is all that the Commission, under many decisions of this Court, is required to do. *United States* v. *Baltimore & Ohio R. R.*, 293 U. S. 454, 465.

While it was contended in general that there was no substantial evidence to support the order, the District Court specifically concluded to the contrary (Conclusion of Law No. 1). The only specific contention in this connection made on appeal, however, appears to be that since the greater part of appellant's mileage was over a regular route, there was no evidence to support the finding that its operations were over irregular routes (Jurisdictional Statement, p. 10). This contention is well answered by the following statement in the lower court's opinion (p. 7):

"Third: It was also proper to describe the route as 'irregular.' A 'regular' route means one which has only 'fixed termini,' not one which always traverses the same roads for part of its route. The fact that the plaintiff picks up and sets down its passengers at places of their own choosing, makes its whole route 'irregular.'"

The claim that the Commission committed procedural errors is equally groundless. Appellant's predecessor was given ample notice of the rehearing, and the fact that it did not see fit to attend and furnish additional evidence is completely immaterial. The District Court states (p. 7) that "plaintiff * * * does not even now allege that any other evidence would have changed the result." The Commission, like a court, was perfectly free to change its mind in the second order after having reconsidered the original record without taking further evidence. *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215, 218, affirmed October 12, 1942, *per curiam*, No. 113, this term, 63 S. Ct. 31, 152.

For the foregoing reasons it is submitted that the decree of the District Court should be affirmed.

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U. S. GOVERNMENT PRINTING OFFICE: 1943